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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 382

UNIVERSAL CARLOADING & DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

REA FORHAN PEDRICK, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. PEDRICK; AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD; AND CARL BIER, GENERAL CHAIRMAN OF SAID BROTHERHOOD ON THE PROPERTY OF UNIVERSAL CARLOADING & DISTRIBUTING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Universal Carloading & Distributing Company, Inc., prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on June 26, 1950, affirming the judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the trial court (R. 873-919) is not officially reported. The opinion of the court of appeals (R. 976-979) is not officially reported.

Jurisdiction

The judgment of the court of appeals sought to be reviewed was entered June 26, 1950 (R. 980). By order entered September 8, 1950, Mr. Chief Justice Vinson extended the time within which petition might be filed to October 24, 1950 (R. 981). The jurisdiction of this court is invoked under Title 28, U. S. C., sec. 1254(1).

Question Presented

Whether the petitioner corporation, a nation-wide freight forwarder, prohibited from direct rail carriage and performing none, but specializing in consolidation, and breakdown and distribution of carload or truck-load freight for expedited movement by impartially selected truck-railroad-water routes and carriers, acting in the capacity of shipper and consignee on separate bills of lading issued by each carrier component, paying truck or carload rates, and charging the owners rates approximating rail LCL, is an "employer" as defined in, and hence subject to the tax rates prescribed by, the Carriers Taxing Act (26 U.S.C., sec. 1532(a)).

This includes the specific question whether, under the *Duquesne* case, the mere fact that the physical act of loading and unloading is necessarily and integrally involved in its sole business of loading LCL or LTL package freight to destination in consolidated carloads and truckloads for expedition and to obtain carload and truckload rates—a trans-

portation service by law barred to railroads—may properly be held to make petitioner a company "which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad" within the definition of employer contained in the Carriers Taxing Act of 1937.

Statute Involved

The Carriers Taxing Act of 1937, June 29, 1937, c. 405, 50 Stat. 1135 (45 U.S.C. secs. 261-273) reenacted in the Internal Revenue Code, (26 U.S.C. secs. 1500-1538) applicable to the years here in question provided (Title 45, U.S.C.):

> "Sec. 262. In addition to others taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936. * * * (1). With respect to compensation paid to employees for services rendered during the calendar year 1939 the rate shall be 2¾ per centum;
>
> [The rate prescribed for 1940-1942 inclusive, was 3%, with similar increase of ¼% each three years.[1]] (26 U.S.C. sec. 1520)
>
> "Sec. 261. Definitions.
>
> As used in this subchapter—
>
> (a) Employer.—The term 'employer means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under com-

[1] By subsequent amendment the rates were further increased for years subsequent to 1946 and the Act codified as Sub-chapter 9B of the Internal Revenue Code was rechristened the Railroad Retirement Tax Act. Act of July 31, 1946, c. 709, sec. 3(g) 60 Stat. 724, 725 (26 U.S.C. sec. 1538.)

mon control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, or handling of property transported by railroad * * *.

* * * * * * *

(h) Carrier.—The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act." (26 U.S.C. sec. 1532(a)(h)).

The Interstate Commerce Act (Part I) provides:

Sec. 1. *Regulation in general;* . . . *—Carriers subject to regulation*

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; . . .

(3)(a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. . . . The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment of carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported . . . ." (49 US.C. Sec. 1)

Statement

A single issue is presented: Whether petitioner "operates any equipment or facility or performs any service * * * in connection with the transportion of * * * property by railroad" within the meaning of the second of the two elements of the definition contained in the Railroad Retirement Tax Act.[2]

Because its business is a transportation service, related no more to rail than to motor transportation, and is "freight forwarder" transportation service that is by the Interstate Commerce Act distinguished in all its elements from the transportation service of carriers by rail, motor and water, and which under decisions of this Court and as well by the same Act, rail carriers are prohibited to perform, petitioner has in view of legislative history and derivation of the definition always maintained that it performs no service "in connection with the transportation * * * property by railroad" within the meaning of the statute here in question.[3]

Petitioner brought three suits consolidated for all purposes (R. 59-60, 873, 946) in the United States District Court for the Southern District of New York against Pedrick, Collector for the Second Collection District of New York, to recover back taxes and interest assessed and paid under the

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[2] The identical definition is contained in the Railroad Retirement Act of June 24, 1937, c. 382, sec. 1, 50 Stat. 307, as amended, 45 U.S.C. sec. 228a, and the Railroad Unemployment Insurance Act, June 25, 1938, c. 680, sec. 1, 52 Stat. 1094, as amended, 45 U.S.C. sec. 351.

[3] Petitioner does not here seek review of the holding below that on the facts, it is, within the meaning of the other element of the definition of employer, "a company which is directly or indirectly owned or controlled by one or more such carriers [by railroad]" i.e. New York Central which owns 49.56%, subject to a voting Trust, of all the stock of petitioner's wholly-owning parent, United States Freight Company.

Carriers Taxing Act of 1937 (45 U.S.C. secs. 261-273).[4] The amounts claimed represent the excess taxes and interest over and above the liability had the taxes for the several years been assessed under the lower rates prescribed by Title VIII of the Social Security Act, 42 U.S.C. secs. 1001-1011 made part of the Internal Revenue Code as Federal Insurance Contribution Act (26 U.S.C. secs. 1400-1432).[5] Appropriate claims for refund were seasonably made, I.R.C. § 3313 and either rejected or not ruled on within six months (R. 945, 946, 43, 45, 47), and suits were timely filed I.R.C., § 3772.

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees intervened as defendant (R. 16-18) and in the first case filed an answer to the complaint (R. 18-21).

After amended answers filed by the Collector (R. 13, 45, 57), and trial to the court without a jury, the court made its findings of fact (R. 920, 949) and its conclusions of law (R. 949-951), that during the period in suit petitioner was controlled by New York Central Railroad Corporation (R. 949).

The court also found that since its organization Universal has been engaged *exclusively* in the business of freight forwarding as that term is now defined in Part IV of the Interstate Commerce Act (R. 938), but that a major part of the activities of Universal are activities which could be performed by railroads, and are activities in connection with the transportation of property by railroad for which the

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[4] The taxes and interest were paid for the periods July 1, 1939–December 31, 1941,—$488,908.60; January 1, 1942–December 31, 1943—$382,916.95; January 1, 1944–December 31, 1946—$730,678.98. The administratrix was subsequently substituted (R. 866).

[5] In the first cause of action the amount claimed included the tax paid by Universal as the "employer" and as well the tax paid by its "employees" under the Act; in the second and third, of the taxes paid by employees amounts claimed included only so much as are covered by written consents of employees (R. 873-874, note).

railroad could make a change (R. 943).[6] It concluded as a matter of law that petitioner "operated equipment and facilities and performed services within the meaning of the clause of the Carriers Taxing Act and the Railroad Retirement Tax Act defining the term "employer" (R. 949-951). The court filed an opinion to the same effect (R. 872-919) and accordingly entered judgment dismissing the complaint (R. 952-953).

The Court of Appeals for the Second Circuit refused to consider the legislative history of the statute and assuming control, not here questioned, held that this court in *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453-454, had prescribed a test here satisfied in that in its view petitioner performs "loading and unloading" and other services that could be performed by railroads in connection with transportation. It therefore concluded that petitioner had properly been held by the District Court to be within the coverage of the statute and accordingly affirmed.

There is no dispute as to the facts. In pertinent substance they may be briefly stated:

Petitioner, a freight forwarder, is a corporation organized in December 1925 to take over as an operating company, a consolidated freight forwarding business of two predecessor companies, Baldwin Universal Consolidated Company, organized in 1919 and Transcontinental Freight, all of the stock of both of which had been acquired by United States Freight Company ("Freight Company") earlier in the same year. Except for qualifying shares, the Freight Company has owned all the stock of petitioner since its organization (R. 921-922).

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[6] This finding (involving a conclusion of law as well) is based on the evidential finding (R. 943): "Railroad carriers also handle less-than-carload shipments and the *physical* operations involved also consist of" physical operations involved in freight forwarder operations (Emphasis supplied).

The general nature of the freight forwarding business and its distinguishing characteristic as a dispatching agency specializing in the co-ordinate utilization of various forms of transportation—rail, motor truck and ship—to enable shippers to obtain the best means available for transportation (R. 939-943) is familiar to, and outlined in the opinions of this court in *United States* v. *Trucking Co.*, 310 U. S. 344, 345-346; and in *Chicago etc. R. Co.* v. *Acme Freight*, 336 U. S. 465, 467.[7] Forwarders, of course, perform no actual carriage. As shown by the findings petitioner's local cartage is by local drayman (R. 940); off-line hauls are by motor common carrier (R. 941); and line hauls by a rail or motor carrier.[8]

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[7] In the Acme Freight case the description is as follows:

"Freight forwarders consolidate less-than-carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less-than-carload rates; their expenses and profits are derived from the spread between the carload and l.c.l. rates. Forwarders are utilized by l.c.l. shippers because of the speed and efficiency with which they handle shipments, the unity of responsibility obtained, and certain services which forwarders make available.

"Forwarders are required by § 413 of the Act, 49 U.S.C. § 1013, to issue bills of lading to their customers, covering the individual package shipment from time of receipt until delivery to the ultimate consignee. When the freight is consolidated into carloads, the railroad gives the forwarder its bill of lading in which the forwarder is designated as both consignor and consignee. The contents are noted as 'one carload of mixed merchandise' and usually move under an 'all-commodity' carload rate. The destination set out in the railroad bill of lading is the forwarder's break-bulk point. At that point the carload is broken up; some shipments may be distributed locally, some sent by truck to off-line destinations, and some consolidated into carloads for reshipment to further break-bulk points. The railroad has no knowledge of the contents of the car, the identity of the individual shippers, or the ultimate destinations of the consignments. The forwarder has an unqualified right to select the carrier and route for the transportation of the freight."

[8] Like other freight forwarders, petitioner is regulated, and operates pursuant to a permit issued, by the Interstate Commerce Commission in accordance with the Freight Forwarder Act adding Part IV to the Interstate Commerce Act (Act May 16, 1942, c. 318, 56 Stat. 284 (49 U.S.C.

The business of the predecessor companies, chiefly in Official Classification Territory, had been given to D. L. & W., Nickel Plate, Wabash, Baltimore & Ohio and Lehigh Valley (R. 87-88) with but little regard for economies incident to concentration upon one railroad. But by 1925-1926, the majority of Universal freight was being shipped on the New York Central Railroad which covered that territory very thoroughly (R. 88). Such concentration on one railroad to as great a degree as possible, a common practice of forwarding companies was dictated by considerations of economy of operation and efficiency through increased ability to make up from daily LCL tonnage carloads of the minimum weights prescribed by railroad tariffs (R. 92) and by the general efficiency consequent upon unification and permanency of assembly and distributing functions at the stations essential to a forwarding operation [9] (R. 418, 924).

As a result of concentration of Universal stations on New York Central Lines because of its more complete coverage of the territory, Central's share of Universal's traffic in Official Territory grew from 50 percent in 1925 to 75 percent in 1929 (R. 526-527) and of Universal's total rail traffic, which expanded beyond that territory commencing in 1926, it grew from 33⅓ percent in 1928 to 50

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secs. 1001-1022). The Interstate Commerce Act as so amended defines "freight forwarder" as "any person which (*otherwise than as a carrier* subject to chapter 1 [rail] 8 [motor] or 12 [water] of this title) holds itself out, etc. (49 U.S.C. sec. 1002 (a)(5)). The Act also specifically provides "Permits issued under this chapter shall not authorize the holder thereof to conduct any direct railroad, water or motor-carrier operations except [motor vehicle pick-up and delivery in terminal areas (49 U.S.C. sec. 1010(h))]. (Emphasis supplied)

[9] Acme Fast Freight concentrates on the Lackawanna and the Wabash; National Carloading on the Erie; Republic Carloading, Wells-Fargo, Associated Forwarders, General Carloading, on the Baltimore & Ohio; Clipper Carloading, Springmeyer Shipping on the Pennsylvania (R. 145-146, 418-419).

percent in 1929-1930 (R. 89, 421, 527, 545-547, 924-925).[10] This concentration on the New York Central in Official Territory had been established before Central first commenced in October, 1929, an interest in United States Freight, petitioner's parent corporation.[11]

To furnish its unique service and as well, to obtain the lower carload or truckload rate essential to profit operation, the company has now grown to nation-wide operation of about 100 stations throughout the United States each serving surrounding areas of about 100 miles (R. 93, 939).

In a few cities, including Philadelphia and New York, certain railroads, under their general tariffs, applicable to all carload shippers, performing the physical loading and unloading for Universal (R. 138-139, 553-554) [12]. But in most cases, LCL shipments received by Universal are, with Uni-

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[10] Beyond official territory, Universal uses the Southern, Missouri Pacific, Gulf Coast, Chicago & Northwestern, Burlington, Great Northern, and Union Pacific (R. 419-426).

[11] In 1937, New York Central's holding in United States Freight, which had become a little more than half the outstanding shares of freight, was reduced to 49.56 percent (R. 925-929). October 11, 1938, the Interstate Commerce Commission after investigation, found that the New York Central controlled petitioner and in consequence had been granted concessions not accorded other shippers and entered a cease and desist order (R. 930). The Commission also found that the Erie, Chesapeake & Ohio, and Pere Marquette each owned a third of, and controlled National, and concluded that these railroads were thus indirectly and unlawfully consolidating LCL shipments. *Freight Forwarding Investigation*, 229 I.C.C. 201, 297. To end such control and illegality, a voting trust was established on June 15, 1939, with Balthasar H. Meyer, a retired member of the I.C.C. as trustee (R. 931-932, 933).

[12] At New York City, the Central, and in Philadelphia, the Reading include in their line-haul tariffs loading and unloading even as to carload shipments. However, in New York until April 14, 1946 and in Philadelphia until July 1, 1946, Universal performed its own loading and unloading, receiving allowances published as exceptions to the tariff. Thereafter, the railroads did the physical loading and unloading (R. 139, 155, 554-555). Against possible misinterpretation of Finding 62 (R. 943-4), it should be noted that none of the loading and unloading by Universal included other than its own shipments (R. 143, 154-155).

versal labor and as they come in through the day, loaded to their respective destinations and pursuant to Universal planning into the proper car or truck at the platform to make up the full minimum-weight consolidated carload or truckload shipment taking the lower carload or truckload rate (R. 97, 98, 511, 530, 531, 535).

Motor is substantially as important as rail transportation in petitioner's business. Beginning in the 1930's over-the-road trucks, having a minimum truckload of only 18,000-20,000 pounds (comparing with railroad carload of 30,000-40,000 pounds) and having LTL truck rates well below rail LCL rates diverted traffic from rails and Universal but at the same time offered freight forwarders generally a more readily available means of serving smaller communities [13] and of obtaining bulk rates since it was much easier daily to accumulate the truckload minimum and so maintain daily service at a profit (R. 118, 123-4, 408-9, 426, 502-3). Terminal and intermediate route time and expense factors have resulted in shift to trucks exclusively, both ways except for limitations of available truck space, on line-hauls as long as Minneapolis-New York and Newark-Chicago among many others (R. 102, 119, 426-9).

Universal's line-haul tonnage in 1940 by truck increased to 46.5% of total. Dollars in purchased truck transportation increased to $15.59 million in 1941 and in purchased railroad transportation declined to $15.4 million in 1940 (R. 934). Temporarily during the war, unavailability of motor carrier facilities reversed the trend (R. 934). But in a typical month in 1948 in Official Territory alone, of Universal line-hauls by truck instead of by available rail, totalling 73,833,460 pounds and costing $422,000 seventy-five

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[13] Joseph B. Eastman. Hearings before Subcommittee of Committee on Interstate Commerce on S. Res. 146, 76th Cong., 3d Sess., pp. 477 *et seq.* (1940).

percent could have been by New York Central (R. 469-473, 501).

Basis of decision.—Because the employer definition in the Carriers' Taxing Act, June 29, 1937 [H.R. 7589] 50 Stat. 436 (Railroad Retirement Tax Act, 26 U.S.C. sec. 1532(a)) is identical with that in the Railroad Retirement Act of 1937, June 24, 1937 [H.R. 7519] 50 Stat. 307, as amended 45 U.S.C. sec. 228(a) and in the Railroad Unemployment Insurance Act, June 25, 1938 [H.R. 10127] 52 Stat. 1094, as amended 45 U.S.C. sec. 351, the court below held the case controlled by the decision of this court in *Retirement Board* v. *Duquesne Warehouse Co.*, 326 U.S. 446 (R. 978-9) and affirmed the lower court's judgment for defendant (R. 980).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the loading and unloading by Universal in consolidation of package freight into carload freight are services that could be performed by the railroad in its transportation of property by railroad and for which the railroad could make a charge.

2. In holding that the loading and unloading performed by Universal in its forwarder transportation service of consolidating package freight into carload freight are part of railroad transportation.

3. In holding that the services performed by Universal in its performance of forwarder transportation are part of railroad transportation.

4. In holding that the services performed by Universal in its performance of forwarder transportation are services

performed "in connection with the transportation * * * of property by railroad."

5. In holding that the decision in *Railroad Retirement Board* v. *Duquesne Warehouse Co.* requires conclusion that Universal is within the coverage of the Railroad Retirement Tax Act.

6. In failing to hold that the legislative history of the statute shows that the services performed by Universal as a forwarder were not intended to be covered by the Railroad Retirement Tax Act.

7. In holding that Universal is an "employer" within the meaning of the Railroad Retirement Tax Act.

Reasons for Granting the Writ

Petitioner, without conceding the correctness, does not here seek review of, the determination by the courts below that petitioner was controlled by the New York Central Railroad. However, there is here involved no attempt by the railroad carrier to avoid the burden of the special railroad retirement and insurance Acts through creation of a separate subsidiary to operate a part of its railroad transportation plant or service (cf. *Despatch Shops, Inc.* v. *Railroad Retirement Board,* 154 F. 2d 417) an abuse against which the carrier-affiliate provision was primarily aimed. *Martin* v. *Federal Security Agency,* 174 F. 2d 364, 367. Petitioner, through its predecessors and after its organization in 1925 but before any kind of control by New York Central, had established a successful forwarding business, a business in which railroads may not engage.

The error of the court below lies in holding that activities performed by forwarder integral with forwarder transportation are, nevertheless, part of railroad transportation.

1

The Court Below Has Misinterpreted, and Erroneously Applied, the Decision of This Court in Railroad Board v. Duquesne Co., 326 U. S. 446.

The decision of the court below rests upon a misconception of the scope of the decision in the *Duquesne* case. It was apparently led into that misconception by sentences culled from the opinion with inadequate attention to the opinion in its entirety—both what it said and what it significantly did not say. Cf. *Commissioner* v. *Culbertson*, 337 U. S. 733.

(a) *The facts and regulating law were radically different in the Duquesne case.*—There the railroad-owned warehouse company, inter alia, loaded and unloaded carload freight shipped on the same railroad under tariffs which required the shipper to perform that service. Such services of the warehouse, if not part of railroad transportation service were part of no transportation service since warehousing, as such, is not a transportation service. No forwarding transportation service was involved. The Railroad Board contended (and the warehouse company denied) that the principal service involved—warehousing—was one in which, under court and I. C. C. decisions, a railroad itself, though not required so to do, may voluntarily engage, and if it does, the service is part of railroad transportation within the meaning of Section 1(3) of the Interstate Commerce Act (citing American Warehousemen's Association of Inland Waterways Corp., 188 I. C. C. 13, 15; *C. C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588). See Brief for Railroad Board in *Railroad Board* v. *Duquesne, supra* (Nos. 95, 103, O. T., 1945) pp. 40, 65.

In any event, warehousing was certainly not, as here, a distinct transportation service in which a railroad is prohibited from engaging.

The Board in its brief also pointed out that, contrary to the contention of the Warehouse Company, there was no anomaly presented in subjecting to the burdens of the Railroad Retirement Act a railroad subsidiary warehouse in competition with a similarly operated unaffiliated warehouse subject only to the Social Security Act tax because there are many warehouses directly operated by a railroad and it is proper to treat them on the same basis whether owned directly or by railroad affiliates (Brief for Railroad Retirement Board, *supra*, pp. 59-60). Finally, the loading and unloading there involved, regardless of which company supplied it, involved the same shipment, a carload shipment, for the same shippers, the owners, as an accessory to rail transportation between the same origin and destination points and covered by the same bill of lading issued to the same shippers, thus requiring a mere choice of which entity should perform.

The attention of this court had also been directed to the holdings of non-coverage of steamboat companies in *Magruder* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (4th Cir., 1944) and in *Allen* v. *S. S. Co. of Savannah*, 123 F. 2d 469 (5th Cir., 1941) wherein the steamship company performed loading and unloading open to performance by the railroad under its tariffs. *Ocean S. S. Co. of Savannah* v. *Allen*, 36 F. Supp. 851, 855 (M. D. Ga. 1945). In Duquesne's petition for certiorari these cases had been relied upon as presenting a conflict. Referring to them, Judge Frank in his dissent to the opinion in the court below (reversed here) had suggested (*Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 148 F. 2d 473, 488):

> "Those cases, however, did not relate to warehouse companies like appellee but to steamboat companies; and it may be that the legislative history excludes entities of the latter kind from the Act's coverage, a question we need not here consider."

(b) *The Duquesne opinion is limited to the facts of that case.*—This Court ruled that the statutory definition at the very least embraces activities which "form a part of transportation [14] service within the meaning of the Interstate Commerce Act" (326 U. S. 446, 453). But it was against the factual and legal background outlined above that this Court held the "loading and unloading services performed by Duquesne are services performed 'in connection with the transportation of * * * property by railroad.'" (326 U. S. 446, 455). Careful analysis of the language used by this Court in the *Duquesne* case plainly discloses the intention of this Court not to set up a general test for indiscriminate application to other facts and circumstances.

The language of this Court relied upon by the court below in the instant case is (326 U. S. 446, 454):

> "It [the question] is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs * * *.

Obviously overlooked by the court below was the restrictive language in which this Court on the same page stated:

> "We do not decide whether services other than *loading and unloading which are performed by Duquesne* are in the same category nor whether the 'employer' definitions may be given a broader scope. It is sufficient for the disposition of these cases that the *loading and unloading services performed by Duquesne* are

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[14] Because no other type of transportation affected the questions there, this Court in the *Duquesne* case used merely "transportation" when referring to "railroad transportation" within the meaning of Section 1(3) of the Interstate Commerce Act.

services performed in 'connection with the transportation of . . . property by railroad.'" (Emphasis supplied)

The careful narrowing of the ruling to only the "loading and unloading services performed by Duquesne" is particularly significant in view of this Court's equally careful omission of any mention whatsoever of either of the steamship company cases, particularly the *Ocean Steamship* case which, as here, also involved physical loading and unloading of railroad cars by a railroad-owned company itself engaged in a transportation service other than railroad.

In result, the *Duquesne* decision did not impress the railroad pension and insurance tax and contribution burdens upon an industry essentially different from the railroad business but rather kept within the boundaries of the general intent of the carrier-affiliate provision to embrace in the definition only such affiliates not identified with service legislatively and judicially recognized as a distinct form of transportation.

(c) *The court below ignored the distinguishing facts and law in the instant case.*—Loading and unloading is not offered by petitioner to the public as a separate service. On the contrary, it performs such loading and unloading as an integral part of its freight forwarder transportation service—consolidation in carload lots—without which it would be impossible to discharge its duties under its undertaking. The court of appeals here has applied the *Duquesne* case as a sheer mechanical test without even purporting to give consideration to the distinguishing characteristics of the freight forwarder transportation service—a unitary transportation service separate and distinct from railroad transportation.

Under the definition of "transportation" in Section 1(3) of the Interstate Commerce Act, as amended by Section 1 of the Hepburn Act of 1906, 34 Stat. 583, it was early established that the forwarder, even though a dealer in railroad transportation undertaking to provide such transportation, does not supply transportation service within the meaning of the Act, and is not a carrier but is a shipper (*Export Shipping Co.* v. *Wabash R. R.*, 14 I. C. C. 437 (1908); *Interstate Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508 (1914); *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444 (1917). Neither is the forwarder a motor common carrier within Part II of the Interstate Commerce Act added by Act of August 9, 1935, c. 498, 49 Stat. 543 (49 U. S. C. secs. 301-327) nor is the forwarder to be identified with express companies made common carriers by the Hepburn Act amendment of sec. 1(3) of the Act. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (S. D. N. Y. 1940) aff'd 309 U. S. 638; *Chicago, etc. R. Co.* v. *Acme Freight*, 336 U. S. 465, 478, note 17.

More important, it is established by decision of this Court that the business of the forwarder, i. e., consolidation in carloads of package freight, is "one which a carrier is not authorized or permitted to render." *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 510. Unless limited to mere supply of labor in aid of the forwarder's operations, the holding of the court below that petitioner's services could be performed by the rail carrier plainly violates this statement of the law.

The sharp line separating forwarder transportation service from railroad transportation service already clearly delineated by decisions of this Court was even more definitely pricked out by the addition to the Interstate Commerce Act of Part IV, "Freight Forwarders", by the Act of

May 16, 1942, c. 318, sec. 1, 56 Stat. 284, setting up freight forwarding as a definite type of transportation distinct from the railroad industry—Part I, Motor Carriers—Part II, and Water Carriers—Part III.

Because this Court has held that Part IV "unquestionably accepted and continued" "the previously existing relationship between forwarders and carriers regulated by Part I, II and III of the Interstate Commerce Act" (*Chicago, ect. R. Co.* v. *Acme Freight*, 336 U. S. 465, 476) the following sections of Part IV of the Act [15] are highly pertinent:

> "Sec. 402(a)(7). The term 'service subject to this chapter' means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or *provide* as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform *or provide*; * * *." (49 U. S. C. sec. 1002(a)(7). (Emphasis supplied.)

Dealing with this language in the *Acme Freight* case, this Court has held (336 U. S. 465, 471):

> "While use of the word, 'provide,' lends some support to respondent's thesis that the definition should be

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[15] Of course, the Act § 402(a)(5) (49 U.S.C. 1002 (a)(5)) employs the classic definition:

> "(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

read broadly to include the service performed by common carriers for the forwarders, the House Committee report indicates the contrary. It defines 'service subject to this chapter' as:

> 'the term used throughout part IV when referring to the business or operations of freight forwarders which it is proposed to regulate. The definition is intended to be broad enough to cover *everything the freight forwarder does*, in connection with forwarding by surface facilities, in the course of carrying out his undertaking to the shipper whom he serves. On the other hand, it is not broad enough, of course, to bring under regulation, under part IV, the service performed by the carriers whose services the freight forwarder utilizes in performing his undertaking.' (Italics Added.) (H. R. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.)"

Applied to the instant case, this language clearly recognizes petitioner's position on the one hand that the loading and unloading service performed by the rail carrier when utilized by the forwarder in performing the forwarder's undertaking does not thereby become forwarder transportation service. Indeed, it could not, because Section 410(a), (c) (49 U. S. C. sec. 1010(a), (c) prohibits a common carrier subject to any one of the other parts of the Act from performing any portion of the forwarder service covered by Part IV.[16]

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[16] Sec. 410 (49 U.S.C. 1010) provides:

"(a) No person shall engage in service subject to this chapter unless such person holds a permit, issued by the Commission, authorizing such service * * *.

(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or *any part* of the service covered by the application * * *. *No such permit* shall be issued to any common carrier subject to chapter 1 [rail], 8 [motor] or 12 [water] of this title. (Emphasis supplied.)

On the other hand, the language above quoted clearly sustains petitioner's position: The mere fact that it, a carrier affiliate, is performing in the course of its forwarder service, an activity that could also be performed physically by the carrier and charged for under its line-haul tariff cannot and does not make such activity part of rail transportation. The statute, in such circumstances, makes an integral part of the test the person performing the particular activity. For, as emphasized in the quoted language: "everything the freight forwarder does in connection with forwarding by surface facilities in the course of carrying out his undertaking" is freight forwarder transportation and not part of rail transportation service within the meaning of Section 1(3) of the Interstate Commerce Act.

Just as was pointed out by the court in *Allen* v. *Ocean S. S. Co. of Savannah,* 123 F. 2d 469, 471, a company engaged in transportation other than as a railroad carrier which, in the course of that transportation performs a service that could also have been undertaken by a railroad carrier, is performing such service, not for the railroad carrier as part of railroad transportation service, but for itself as an element of its own distinct type of transportation service.

This also makes common sense since it would be absurd if, after recognizing and working out over a period of years the innumerable details of relationship between four separate types of transportation service, the distinctions were to be broken down by mere mechanical piece-meal analysis of the numerous elementary physical acts which, upon such dissection, will necessarily be found in many instances to be common to more than one of the four types of transportation service. Such an approach pursued to its logical conclusion would involve the anomaly of preventing the forwarder in his forwarder business of loading in consolidated carload lots from doing any loading or unloading of any car, truck

or ship of a direct carrier since Section 410(h) (49 U. S. C. sec. 1010(h)) provides that: "Permits issued under this chapter shall not authorize the holder thereof to conduct any direct railroad, water or motor-carrier operations. * * *" Yet Congress has clearly recognized that loading is an essential in forwarder transportation service by providing in Section 404(d) of the Act (49 U. S. C. sec. 1004(d)):

> "Nothing in this chapter shall be construed to prohibit any freight forwarder from entering into an agreement with another freight forwarder for the joint loading of traffic between points in transportation subject to this chapter * * *."

The basic difference in the undertaking and activities of the two distinct transportation agencies, even though the railroad carrier be utilized in discharging the forwarder's undertaking, is emphasized by this Court in *Chicago, etc. R. Co.* v. *Acme Freight*, 336 U. S. 465, 480:

> "The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, a different consignor and consignee than are involved in the forwarder's undertaking."

If it is not the same shipment, the loading thereof by the forwarder in discharge of his undertaking cannot be the same service as that of the carrier when it loads what is regarded as a different shipment. Obviously, the court below fails to distinguish between the mere physical activity of loading by the carrier and the functionally, economically and legally distinct activity of loading performed by the forwarder in its service of consolidation of package freight into carload or truckload lots.

The loading and unloading done in the warehousing industry, unregulated under the Interstate Commerce Act,

could be held, as in the *Duquesne* case, to demonstrate engagement in an activity there constituting part of railroad transportation because the result was not to encroach upon another field of transportation service expressly distinguished and recognized as such by Congress. Here, on the other hand, application of the same test would cut across and obscure, if indeed it does not render meaningless, the presently accepted distinguishing over-all functional characteristics of each type of transportation service as they have been worked out by the labors of the Commission and the courts over a period of almost half a century in a highly technical field.

Furthermore, in contrast to the situation in the *Duquesne* case, the result here is to subject one of two classes of forwarders, i. e., railroad-controlled companies, to an added tax burden in competition with forwarders of the other class, i. e., not railroad-controlled. There is not involved here, as in the *Duquesne* case, a third competing type of service directly operated by railroads and so subject to the same higher tax burden. All other competition in the instant case comes under the lesser financial burden of the Social Security Act.

Intent thus to disrupt the long-recognized relationships between the several types of transportation service, and without any substantial basis for discriminatorily subjecting one group of forwarders to a substantially greater tax burden, is not lightly to be attributed to Congress. It seems plain that it was the intent of Congress that the activities of a distinct transportation service are not to be analyzed microscopically so as to cut across and obscure the basic functional characteristics of each and that the existing judicial and legislative approach to the same problem be utilized in applying the definition prescribed in the Carriers Taxing Act.

2

The Decision of the Court Below Is in Conflict With Decisions of the Courts of Appeal for the Fourth and Fifth Circuits, and With Administrative Determinations.

(a) *Conflict with Fifth Circuit.*—The decision below is in plain conflict with *Allen* v. *Ocean Steamship Co.*, 123 F. 2d 469 (5th Cir. 1941), aff'g *Ocean S. S. Co. of Savannah* v. *Allen*, 36 F. Supp. 851, 855 (M. D. Ga. 1941). There a steamship-affiliate of a railroad was held not an "employer" within the meaning of the Carrier's Taxing Act. The opinion of the trial court shows that the steamship company performed loading and unloading open to performance by the railroad and for which it could have charged. There the court of appeals said (*supra*, p. 471):

> "Certainly the Congressional intent to include water carriers cannot be drawn from the fact, if it be a fact, which appellant makes so much of, that water carriers, in addition to performing purely steamship services, perform for a charge and for themselves, transportation service which the railroad carriers could have undertaken but left to the water carriers to perform. For, if this were the simple criterion, Congress could easily and would have said so, instead, as it did, of confining the application of the act to rail carriers and companies owned by them which performed a part of their transportation service for them. Appellant realizing this difficulty, in the way of his construction, devotes a good part of his brief to arguing that the services performed by appellee are performed not for itself but as agents for railroad carriers. But on the record this will not at all do.

As stated above, p. 15, the *Allen* case was relied on by Duquesne in its petition for certiorari as creating a conflict. The opinion of this Court in the *Duquesne* case signally fails to mention the *Allen* case. As shown above, rightly read,

the *Duquesne* opinion did not purport to overrule it either directly or by implication.

By opinion letter to Seatrain Lines, Inc., dated June 25, 1946, it was expressly stated by the Board's general counsel: "The later decisions of The United States Supreme Court in Railroad Retirement Board v. Duquesne, — U. S. —, 90 L. ed. (Adv. Ops.) 202 in January, 1946, partaining to a border-line question of employer status does not, apparently, affect the two steamship company decisions" (the other being *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (4th Cir., 1944) aff'g 50 F. Supp. 639 (Md. 1943).

Not more than 20 days prior to filing this petition we have been informed by the general counsel for the Board that it has not since the *Duquesne* decision sought to bring either steamship company within the coverage of the Acts it administers.

On the facts deemed pertinent by the Second Circuit the two cases are identical. There is thus presented a square conflict with a decision of another circuit being given continuing effect by the administrative body most concerned, on the ground that it was not overruled by the *Duquesne* decision.

(b) *Conflict with Fourth Circuit.*—The decision below is also in conflict with the decision of the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (4th Cir., 1944) aff'g 50 F. Supp. 639 (Md. 1943). There, no loading or unloading was involved. But the carrier-controlled steamship line did own lighters, and furnished lighterage service for interchange and through freight from railroad piers to its ships in Baltimore and Norfolk Harbors. *Walling* v. *Baltimore Steam Packet Co.*, 50 F. Supp. 639, 643. Lighters are specifically named as facilities included in "railroad" defined in Section 1(3) of the Interstate Commerce Act. Such lighterage service may be

assumed by railroads as part of rail transportation and charged for in their line-haul tariffs. *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S. 274, 281.

There is thus a clear conflict since the Bay Line Steamship Company, a carrier-affiliate, was there performing a service that could have been performed by the owning carrier, Seaboard Air Line and charged for under its line-haul tariffs.

(c) *Conflict with administrative determinations.*—The decision below conflicts with the administrative determinations of the Railroad Retirement Board which also fail to apply the *Duquesne* case as a mechanical test. In June, 1946, after decision in the *Duquesne* case, the Railroad Retirement Board held Seatrain Lines, Inc., not to be covered although that employer's activities would seem clearly to satisfy the automatic rule as applied by the court below. The company controlled an interstate railroad—Hoboken Manufacturers Railroad (*Hoboken Manufacturers* v. *United States*, 47 F. Supp. 778, 782) and a large portion of its stock was owned by Missouri Pacific (Annual Report of Seatrain Lines to I. C. C., 1945, Sch. 109). Common control with rail carrier was clear. Equally clear is the fact that it furnishes car service, part of railroad transportation, and it owns railroad box cars, expressly recognized as facilities of railroad transportation (Interstate Commerce Act, Section 1(4)). *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428. Satisfaction of the mechanical test applied by the court below is clear. But it too was held not within the "employer" definition here involved. Indeed, as noted above, in the opinion letter of the Board dated June 25, 1946, it is expressly stated by the Board's general counsel that the *Duquesne* case is not deemed to affect the two steamship company decisions.

The unavailability of the test in the *Duquesne* case as a general rule of thumb is apparent if it be considered that

probably every railroad-controlled company that merchandises to the public and ships in carload lots is, under that test, an "employer" within the ambit of the Act. Certainly would this be true if it sells F. O. B. and, as is customary with carload shippers, assumes the burden of loading the cars for the purchasing public, a burden that a railroad might also undertake under its tariffs. For the purchase price for merchandise sold represents not only the value of the merchandise but also the service in loading the car. The Board has held such companies not to be covered. But under the rule of the *Duquesne* case as construed by the court below the railroad retirement coverage would appear to extend to the following railroad-controlled companies so exempted from coverage by the Board. *Arkansas Portland Cement Co.*, 2 R. R. B. Law Bulletin, p. 385; *Frost Lumber Industries Incorporated of Texas, id.*, p. 120; *Puget Sound Pulp and Timber Co., id.*, p. 303; *Southwest Lumber Mills, Inc., and Cady Lumber Corporation, id.*, p. 306; *Pennsylvania Salt Mfg. Co., id.*, p. 363; *Michigan Alkali Co., id.*, p. 364; *Union Tanning Co., id.*, p. 272; *Brooklyn Cooperage Co., id.*, p. 133; *Witherbee-Sherman Corp., id.*, p. 264.

Unless the *Duquesne* decision is to be continued as a tool of administration of the law by whim and caprice, the record in this case must be reconsidered in the light of all the relevant law affecting the relationships.

3

The Legislative History Shows That Congress Did Not Intend to Include Freight Forwarder Services in the Definition of "Employer" in the Railroad Retirement Tax Act.

Petitioner, while relying on substantially the same legislative history presented in *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446 (1946), seeks to

establish an interpretation less narrow than was there sought to be established.[17] Congress did intend that the railroad retirement legislation should be broad enough to embrace railroad-controlled corporations, not engaged directly in railroad transportation, but performing services essential thereto.

The definition of railroad transportation appearing in the railroad social insurance and railroad labor legislation was in substance used by Congress as early as 1906 in the Interstate Commerce Act, as amended, 49 U. S. C. Sec. 1(3). The Interstate Commerce Commission in evolving the meaning of this language and interpreting the scope of the legislation has consistently held that freight forwarding is not a part of railroad transportation as contemplated by the language of the Act.[18] This Court has approved that interpreted exclusion.[19]

The Commission, beginning with its 1930 Annual Report, which expressed concern over freight forwarding and trucking competition with railroads, urged amendment of the Interstate Commerce Act to bring these transportation services within its ambit. Motor Carriers were included in 1936 as Part II, and Freight Forwarders in 1942 as Part IV, of the Act[20] recognizing freight forwarding

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[17] Duquesne there argued that the legislative history restricted the definition to services performed while the property was actually being transported by the railroad.

[18] *Calif. Comm. Ass'n* v. *Wells-Fargo & Co.*, 14 I.C.C. 422 (1908); *Export Shipping Co.* v. *Wabash R.R. Co.*, 14 I.C.C. 437 (1908); *In the Matter of Container Service*, 173 I.C.C. 377 (1931); *Freight Forwarding Investigation*, 229 I.C.C. 201 (1938).

[19] *I.C.C.* v. *D.L.W.R. Co.*, 220 U. S. 235 (1911); *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508 (1914); *Lehigh Valley v. United States*, 243 U. S. 444 (1917); *Merchants Warehouse* v. *United States*, 283 U. S. 501 (1931); *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (1940), aff'd per curiam 309 U. S. 638 (1940).

[20] Act of May 16, 1942, c. 318, 56 Stat. 284, 49 U.S.C. 1001, *et seq.* (1946).

as a separate, distinct and co-existing service of transportation.

Meanwhile, the earlier Act of May 20, 1926, c. 347, 44 Stat. 577, was supplanted by an amending act proposed by Joseph B. Eastman as Federal Coordinator of Transportation, and enacted as the Railway Labor Act of 1934, Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151, et seq. The bill as introduced defined its scope by reference to the Interstate Commerce Act:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act . . ."[21]

Upon objection to such reference grounded on draftsmanship, Mr. Eastman submitted an amended definition "paraphrasing Section 1(3) of the Interstate Commerce Act":[22]

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad."

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[21] S. 3266, 73d Cong., 2d Sess. (1934).

[22] Testimony of Joseph B. Eastman; Hearings before Senate Committee on Interstate Commerce on S. 3266, pp. 145-146, 73d Cong.., 2d Sess. (1934).

The Railroad Retirement Act of 1934,[23] considered by Congress at the same time it was debating the amendments embodied in the Railway Labor Act of 1934, was intended to have the same scope.[24]

Intent in both Acts was to embrace those subsidiaries of the railroads, which, while not themselves engaged in actual railroad operations, perform services necessary to such operations and services which the railroad itself could perform.[25]

No proceedings under the Railway Labor Act have ever been brought against freight forwarding companies. It is significant that the same railway labor union, now respondent here, repudiated the inclusion of petitioner within the definition for which it now contends by invoking the jurisdiction of the War Labor Board in an arbitration proceeding (*In the Matter of Universal C. & D. Co., et al.*, 10 Lab. Rel. Rep., 146-147 (1942)) and of the N.L.R.B. (*In re Universal C. & D. Co. and Int'l Brotherhood of Teamsters, etc.*, 77 N.L.R.B. 1148 (1948)). Since the Railway Labor Act of 1934 prescribes procedures for adjustment of labor disputes with the defined employers under supervision of the National Mediation Board (45 U.S.C. secs. 155, 157) and since the order creating the War Labor Board specifically provides that it shall not apply to labor disputes for which settlement procedures are otherwise

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[23] Act of June 27, 1934, c. 868, 48 Stat. 1283, 45 U.S.C. 201-214.

[24] *Railroad Retirement Board* v. *Duquesne Warehouse*, 326 U. S. 446, 451. Statements by Senator Wagner and Representative Hatfield, sponsors of the bill at 78 Cong. Rec. 11483 and 11166 (1934).

[25] See Mr. Eastman's testimony. Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess. (1934); and Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73d Cong., 2d Sess. (1934). See also *Railroad Retirement Board* v. *Duquesne Warehouse*, 326 U. S. 446 (1946).

provided until they are exhausted,[26] that Board necessarily determined that petitioner was not within the definition of the Railway Labor Act. The same repudiation and administrative determination were more recently made in *In re Universal C. & D. Co.* and *Int'l Brotherhood of Teamsters, etc.*, 77 N.L.R.B. 1148 (1948). There the National Labor Relations Board implicitly determined petitioner was not within the definition here involved since the definition of employer in the National Labor Relations Act (July 5, 1935, c. 372, sec. 2, 49 Stat. 450) as in the Labor Management Relations Act of 1947 (June 23, 1947, sec. 101, 61 Stat. 137 (29 U. S. V., sec. 152, Supp. 1950)) excludes any person subject to the Railway Labor Act.

The 1954 Retirement Act was declared unconstitutional in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330 (1935). The proposed new bills (Retirement and Carriers Tax) included two new transportation agencies: private-car lines and freight forwarders.[27] The reference to freight forwarders was stricken from the Retirement bill in committee; hence, when the companion taxing act was considered its coverage was similarly amended to conform to the retirement act.

During the hearings on the taxing bill, Representative Crosser, long distinguished in Congress as the sponsor of railroad employee legislation said:

> "The tax is levied upon a long-recognized and well-defined class. The carriers subjected to the tax are those long regulated and supervised under the Interstate Commerce Act, under provisions applicable exclusively to such carriers.

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[26] E.O. No. 9017, sec. 2, January 12, 1942, 7 F.R. 237. See McConnell, *The Organization and Procedure of the N.W.L.B.*, 9 Law and Contemp. Prob., pp. 567, 568, 570.

[27] Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce on H.R. 8651, 74th Cong., 1st Sess. (1935).

"The employee classification is based upon that set forth in the Railway Labor Act and the earlier acts affecting employees of the carriers. These employees enjoy advantages which distinguish them clearly from employees of other employers engaged in similar occupations.

"Under a long line of acts of Congress special provision has been made for their safety. Their hours of labor have long been regulated. Their right to maintain organizations to bargain collectively through representatives of their own choosing has been enforced by law for many years. The long-established seniority rule, together with the necessity for continuous operation of the national transportation system by railroad, have brought about greater continuity and permanence of employment than in any other field of employment.

"In recognition of these facts the employees are practically unanimous in support of the proposed tax. The great interest of the Nation in the railroad transportation system makes it certain that these distinctions are and must be sustained. The proposed tax is one amply sustained as a proper classification." [28]

The 1935 acts [29] were held unconstitutional in *Alton R. Co.* v. *Railroad Retirement Board* (Dist. Col., 1936), 16 F. Supp. 955. Thereupon the carriers subject to the Interstate Commerce Act and the railway unions agreed to, and jointly proposed, new companion acts: Railroad Retirement Act of 1937,[30] and the Carriers Taxing Act of 1937.[31] Mr. George Harrison, President of the Brotherhood of Railway Clerks, who presented the bill for both the employers and employees explained that the coverage was still that of the

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[28] Hearings before House Committee on Ways and Means on H.R. 8652, pp. 10-11, 74th Cong., 1st Sess. (1935).

[29] Act of Aug. 29, 1935, c. 812, 49 Stat. 967. Act of Aug. 29, 1935, c. 813, 49 Stat. 974.

[30] Act of June 24, 1937, c. 382, 50 Stat. 307, 45 U.S.C. sec. 228, et seq.

[31] Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U.S.C. sec. 261, *et seq.*

Railway Labor Act except that changes brought into coverage employees of the various railroad associations and the employees of the railway labor unions.[32] Contrary to possible inferences from Senator Wagner's statement there were no other extensions or changes.[33] Freight forwarders, still unregulated, did not participate in the preparation or presentation of the bill in Congress because they were not proposed to be covered.

The following year, 1938, Congress enacted a system of unemployment insurance with the same coverage definition found in the retirement acts.[34]

That same year, the Interstate Commerce Commission, in *Freight Forwarding Investigation*, 229 I. C. C. 201 (1938) proposed specific legislation to bring freight forwarders under federal regulation. The report noted that certain of the physical activities of freight forwarder service are similar to those of other transportation services, but emphasized the distinctions which made it unique and not within the existing regulatory authority of the Commission. Stressing this uniqueness, the proposed legislation embodied a separate regulatory scheme which became Part IV of the Interstate Commerce Act.[35] As this Court has held, the new act did not alter the existing relationships between forwarder transportation and direct carrier transportation.[36]

In 1945 and 1946, Congress reexamined the entire railroad social insurance system and the then Chairman of the Rail-

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[32] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 6956, 75th Cong., 1st Sess. (1937), pp. 17, 18.

[33] 81 Cong. Rec. 6223 (1937). See *Railroad Retirement Board* v. *Duquesne Warehouse*, 326 U. S. 446, 452, fn. 10.

See H.R. Repts. Nos. 1069, 1071 and S. Repts. Nos. 697, 818, 75th Cong., 1st Sess. (1937).

[34] Act of June 25, 1938, c. 680, 52 Stat. 1094, 45 U.S.C. 351 *et seq.*

[35] 49 U.S.C. sec. 1001, *et seq.* (1946).

[36] *Chicago, etc. R. Co.* v. *Acme Fast Freight Co.*, 336 U. S. 465, 476 (1949).

road Retirement Board, Murray W. Latimer, told Congress that petitioner was going to be held within the scope of the Railroad Retirement Act of 1937, although he and the Board had not yet reviewed the evidence.[37] He further pointed out the discriminatory result of such a ruling in urging adoption of the so-called Crosser bill to amend the definition to include all freight forwarders. Because his principal interest appeared merely to be expansion of the railroad retirement coverage, Congress apparently refused to attach any weight to Mr. Latimer's testimony[38] and, leaving the definition unchanged, reaffirmed its intention that the legislation be restricted to the well defined railroad industry.

It is illuminating to examine the definition of employer in the rejected Crosser bill 1946 amendments to the railroad retirement acts. The railroad control requirement would have been eliminated entirely. Thus, *any* company performing services "in connection with the transportation of passengers or property by railroad" would have been included. Yet the bill proposed specifically to add freight forwarders by name. The inference is plain that as late as 1946 the Railroad Retirement Board, which drafted the amendments,[39] did not deem freight forwarding so "obviously" a railroad transportation service.

Thus, as recently as 1946, Congress has refused to broaden the scope of railroad social insurance legislation, believing with the Social Security Board that the considerations

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[37] Hearings before House Committee on Interstate and Foreign Commerce, on H.R. 1362, 79th Cong., 1st Sess. (1945).

[38] Statements by members of House Committee on the floor of Congress, 92 Cong. Rec. 6595, 7224. See also Mr. Boren, 92 Cong. Rec. A. 3188.

[39] Testimony of David B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen, Hearings before House Committee on Interstate and Foreign Commerce on H.R. 1362, p. 29, 79th Cong., 1st Sess. 1945. See also Statement of Mr. Bulwinkle, 92 Cong. Rec. 6597 (1946).

which led to special treatment for railroad employees do not require that the other types of transportation service be removed from the coverage of general social security legislation.[40] Freight forwarders, motor carriers and water carriers, performing transportation services recognized by the courts, the Congress and by administrative bodies as distinct from the railroad transportation industry, are not within this special legislation.

The legislative history shows that Congress, not only did not expand the scope of railroad legislation to cover other transportation services, but rather intended to exclude them.

4

The Question Involved Is of Great and Continuing Importance

The question here presented obviously affects the scope of burdens and benefits of the Railroad Retirement system of Acts in their application to individuals as well as the tax liability of corporations. It therefore is important, not alone to the petitioner, but to many thousands of workers. The problem here is not merely one of extension of laws and taxes into virgin fields; it is one of contest with another security system under the Social Security Act which imposes its own taxes and confers its own benefits. The Social Security Board in Appendix "E" to the Board's brief in the *Duquesne* case stated (Railroad Retirement Board Br., pp. 84-86):

> "* * * It [the Social Security Board] has paid, and is currently paying, benefits based on services for

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[40] The Social Security Act, 42 U.S.C. sec. 301 *et seq.*, of course, covers the non-railroad employees.

at least forty railroad subsidiaries which the Railroad Retirement Board has held to be covered by the railroad legislation; though expedients have been worked out to avoid duplicate payments in any individual case. The difference of opinion has significance particularly in connection with monthly survivorship benefits, which are payable under the Social Security Act but are not payable under the Railroad Retirement Act [since amended]. The Social Security Board is paying survivors' benefits based on service falling in this disputed area, while the Railroad Retirement Board is paying retirement benefits (which are normally larger) to workers who reach retirement age.

The Social Security Board takes the position, on the basis of the legislative history of the coverage definition, that Congress intended to confine the railroad legislation to the railroad industry, and not to extend it to segments of other industries, such as water or motor transportation, by reason of the ownership of the stock of companies engaged in such activities * * *."

Thousands of individuals are vitally affected. The question of relative expense and relative benefits to the employee taxpayer is also not without interest to those employed in the numerous industries more or less closely related to the transportation industry generally. The following table based on H. R. 6000 modifying the Social Security Act and enacted into law, Act of August 28, 1950 (Pub. Law No. 734, 81st Cong., 2d Sess.) adequately discloses the monetary interest of such workers in the right determination of questions of coverage (App. 96 Cong. Rec. p. A2295 (March 24, 1950)):

"Social security versus railroad retirement tax rates and monthly benefits—a comparison

	Social security, 1950	H. R. 6000 social security, proposed	Railroad retirement, 1950
Tax rate (percent)	[1] 1½	[2] 1½	[3] 6
Cost per month	$3.75	$4.50	$18.00
Cost per year	45.00	54.00	216.00
Maximum retirement benefits possible to 1 worker and his family:			
Old age	$45.60	$64.40 [41]	$80.00
Wife	22.80	32.20	40.00
Husband and wife	68.40	96.60	120.00
Dependent children	[4] 16.60	[4] 53.40	30.00
Total	$85.00	150.00	150.00
			$144.00
	85.00	150.00	
	85.00	150.00	
Maximum retirement benefits possible to 4 workers and their families	85.00	150.00	
	85.00	150.00	
Total	340.00	600.00	
Maximum survivor benefits possible: Widow and 3 or more children or 4 or more children, of 1 deceased worker	85.00	150.00	$108.32
	85.00	150.00	
	85.00	150.00	
Maximum survivor benefits possible to 4 families of 4 deceased workers [4]	85.00	150.00	
	85.00	150.00	
Total	340.00	600.00	

[1] On $250 maximum earnings per month; [2] On $300 maximum earnings per month; [3] Pro rated equally; [4] 4 widows and 12 or more children, or 16 or more children."

[41] The Act, as passed, changes these figures to those enclosed in the box.

The disruptive effect upon the forwarder industry by virtue of the inequity in tax burden created by the decision below is plain. Petitioner, a forwarder, less than 50 percent owned by a rail carrier and in competition on a national scale with other forwarders not so owned, is subjected to an enormous extra tax, particularly burdensome when the competition is so intense and the profit ratio so small. (Universal averaged 2% over the last 20 years.) There are in the forwarder industry only these two types of ownership since no

forwarder business is or can be directly operated by a railroad.

State unemployment taxes are affected. Nationwide, the state unemployment insurance taxes collected under the Social Security Act system may be substantially impaired if by untoward extension of the Railroad Retirement system the numerous companies having some relation to railroad transportation are under the test applied by the Second Circuit held covered by the Railroad Retirement Acts and exempted from the Social Security burdens. See *Walling* v. *Baltimore Steam Packet Co.*, 50 F. Supp. 639, 646 (1943).

Conclusion

It is submitted that the conflict of circuits and the great general importance of the question involved requires that this petition for writ of certiorari be granted.

Respectfully,

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IN THE

Supreme Court of the United States

October Term, 1950

No. 382.

UNIVERSAL CARLOADING & DISTRIBUTING COMPANY, INC.,
Petitioner,

vs.

ESS TOOMEY PEDRICK, as Administratrix of the Estate of William J. Pedrick, and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; GEORGE M. HARRISON, President of Said Brotherhood; and CARL BRAY, General Chairman of Said Brotherhood of the Property of Universal Carloading & Distributing Company, Inc.

BRIEF IN OPPOSITION FOR THE RESPONDENT INTERVENORS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 382.

UNIVERSAL CARLOADING & DISTRIBUTING COMPANY, INC.,
Petitioner,

vs.

EVA FORBES PEARSON, as Administratrix of the Estate of William J. Fedrick; and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; GEORGE M. HARRISON, President of Said Brotherhood; and CHAS. BINS, General Chairman of Said Brotherhood on the Property of Universal Carloading & Distributing Company, Inc.

BRIEF IN OPPOSITION FOR RESPONDENT INTERVENORS BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, ET AL.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 976-979) is reported at 184 F. 2d 64. The opinion of the District Court (R. 872-919) is not officially reported.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

The only question involved is the narrow issue of whether petitioner, as a company actually controlled by the New York Central Railway during the taxable periods in question, performed any service in connection with the transportation of property by railroad within the meaning of Section 1532(a) of the Railroad Retirement Tax Act and was thereby subject to the tax imposed on an employer by that Act.[1]

The question presented is not, as stated by petitioner, whether services performed by petitioner *as a freight forwarder* constitute service in connection with the transportation of property by railroad.

STATUTE INVOLVED

The only statutory provision involved is the below italicized portion of the Railroad Retirement Tax Act[2] (26 U.S.C. Sec. 1500 *et seq.*), reading as follows:

> "*Employer.* The term 'employer' means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, *and which operates any equipment*

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[1] Whether petitioner is an employer within the meaning of Section 1532(a) of the Railroad Retirement Tax Act depends upon whether it (1) is directly or indirectly controlled by any carrier or carriers by railroad, and (2) is performing any service in connection with the transportation of property by railroad. The lower courts found and concluded that petitioner was actually controlled by the New York Central Railroad within the meaning of the statutory provision during the taxable periods involved (R. 881-900, 938, 949, 979). Petitioner seeks no review of this holding (Pet. Br., p. 5, note 3), and accordingly the only question actually involved is whether the courts below correctly held that petitioner also performed services in connection with the transportation of property by railroad.

[2] Prior to 1946 the Act was known as the Carriers' Taxing Act of 1937 (45 U.S.C. §261 *et seq.*). It was incorporated within the Internal Revenue Code in 1939 as Sub-chapter 9B, and on July 31, 1946, was renamed the Railroad Retirement Tax Act.

or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad . . ." (Italics supplied.)

STATEMENT

Respondent intervenors have an interest in common with that of the Government in opposing this petition for certiorari. That interest arises by virtue of the fact that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein called the Brotherhood), is the recognized collective bargaining representative of certain of petitioner's employees who are the direct beneficiaries of the federal legislation here involved.

The Railroad Retirement Tax Act is a companion statute to the Railroad Retirement Act (45 U.S.C. Sec. 228). Under the Tax Act funds are collected through taxes assessed upon both employers and employees. Under the Retirement Act annuities, pensions, and death benefits are paid to the same employees when they reach retirement age or when certain other prerequisite conditions are satisfied. The two acts necessarily coalesce as parts of a single regulatory plan, the purpose of which is to establish a system of retirement annuities and benefits for employees engaged in railroad functions and to finance that system through the collection of taxes. It is well recognized that the Railroad Retirement Tax Act (formerly called, prior to 1946, the Carriers' Taxing Act) is not a mere revenue measure but is a component part of a statutory program to provide retirement annuities for railroad workers.[3] Both the Tax Act and the Retirement Act are also intimately related in design and purpose to the Railway Labor Act (45 U.S.C. Sec. 151) and the Rail-

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[3] *State of California* v. *Anglim*, 129 F. 2d 455, 458 (C.A. 9th); *Wabash R.R. Co.* v. *Finnigan*, 67 F. Supp. 94, 98-99 (E.D. Mo.)

road Unemployment Insurance Act (45 U.S.C. Sec. 351). Together these four acts compose the special group of railroad statutes. Their mutual dependence and interrelationship is as obvious as is the congressional purpose to segregate employees performing railroad work and provide for them social benefits different from those available under the Social Security Act and the Labor Management Relations Act.

We emphasize the interdependence of these statutes at the outset because we believe it is of importance in connection with the petition here presented to recognize, as did the court below (R. 978), that a determination of the status of an "employer" under the coverage definition of the Railroad Retirement Tax Act unavoidably affects the rights of employees to receive not only pension benefits under the Railroad Retirement Act but also unemployment benefits under the Railroad Unemployment Insurance Act, both of which acts contain identically worded employer coverage provisions (R. 978). It is for this reason that the decision of the United States Court of Appeals for the District of Columbia in *Universal Carloading & Distributing Co., Inc.* v. *Railroad Retirement Board, et al.*, 172 F. 2d 22, holding petitioner to be an employer within the meaning of the coverage provision of the Railroad Unemployment Insurance Act, warrants the importance accorded to it by the courts below (R. 901-913, 979).[4]

The pertinent facts of the proceedings below are adequately summarized in the Government's brief in opposition and need not be repeated here. Our argument will be devoted primarily to a discussion of what we regard as the basic error of petitioner's position—namely, the fallacy inherent in its statement and treatment of the issue involved. We shall show that no important question of federal law is here involved which has not been settled by this Court; that the court below has not decided a federal question in a way probably in conflict with applicable de-

[4] The decision is not discussed or cited in the petition.

cisions of this Court; and that there is no conflict in decisions of the several circuit courts of appeals on the issue here involved.

ARGUMENT

1. As we see it, the fundamental error of petitioner's position is the adoption of a fallacious premise and the use of this premise as the basis of its entire argument. In its statement of the question presented, its specification of errors to be urged, and throughout its argument in support of its position, petitioner constantly repeats that all of its services are freight forwarder services, not components of a railroad transportation service, and that a freight forwarder cannot be covered by the definition of "employer" in the Railroad Retirement Tax Act because a carrier by railroad, or specifically the New York Central Railroad which controls petitioner, cannot engage in the activities of a freight forwarder. We submit that the fallacy inherent in such a position is that it ignores the real question at issue and the one decided by the courts below —i.e., whether petitioner as a controlled affiliate of the New York Central Railroad is performing some service which a railroad *could* perform as a part of *its* transportation service.

This effort by petitioner to inject such an issue into the case was expressly rejected by the trial court below. There, as here, petitioner contended (R. 879):

> "It is not disputed that Universal loads and unloads freight cars, handles freight packages, issues bills of lading and performs other functions which are similar or identical with certain physical operations of carriers by railroad. However, these services are performed by Universal not as railroad services but as part of its freight forwarder operations."

In rejecting this argument as specious, Judge Leibell relied directly upon a portion of this Court's opinion in *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S.

446, wherein Mr. Justice Douglas answered the same argument as follows (p. 454):

> "The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service. It is not whether the affiliate would itself be subject to the Interstate Commerce Act. It is whether a carrier's affiliate is performing a service that *could* be performed by the carrier and charged for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts.[5] . . . In other words if a service is involved which the railroad *could* perform as a part of *its* transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation when performed by a railroad but which it chooses to have performed by its affiliate." (Italics supplied.)

Yet petitioner's entire argument to this Court proceeds on the premise that the service which the courts below held to be "service . . . in connection with the transportation of . . . property by railroad . . ." cannot fall within the coverage definition of the Railroad Retirement Tax Act because such services are those of a freight forwarder which the railroad is prohibited by the Interstate Commerce Act from performing. It is true that the railroad may not perform the services in question *qua* freight forwarder, but, as stated very clearly by this Court in the *Duquesne* case, that is not the question. The only question is could the services in question be performed by the railroad and charged for under its line-haul rates.[6]

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[5] The Court was here considering the coverage definitions of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, which, as stated heretofore, are identical with the coverage definition of the Railroad Retirement Tax Act.

[6] The point is succinctly stated by the trial court judge below as follows (R. 880):

Once the question as presented by petitioner and its assignment of errors are thus stripped of the fallacious premise rejected by this Court in the *Duquesne* case, the case is simply resolved. The sole question remaining is whether the services held by the courts below to constitute "service . . . in connection with the transportation of . . . property by railroad . . ." *could* be performed by the New York Central Railroad as a part of *its* transportation service. That they could be is too well established to be seriously contested.

In the first place, not only both courts below but also both the trial and appellate courts of the District of Columbia and two administrative agencies[7] have found as a *fact* that at least a part of the services performed by petitioner constitutes service which could be performed by the New York Central Railroad as a part of its transportation service.

The trial court below specifically states in its Finding of Fact that (1) "Railroad carriers also handle less-than-carload shipments and the physical operations involved also consist of the pick-up, receipt, storage, grouping, consolidating, loading, unloading, and the transfer and delivery of such shipments, plus the actual transportation of the shipments on line-haul movements via their own

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"The Duquesne Warehouse Company could have advanced the same argument, that all of its services were rendered in connection with its warehouse business. If, however, some of its services were of such a character that the railroad itself (which owned and controlled the warehouse company) could have performed those services and charged for them under the railroad's line-haul tariffs, as part of the railroad's transportation services, then those services fell within the second clause of the definition of 'employer' as contained in the Railroad Unemployment Insurance Act of 1938 and the Railroad Retirement Act of 1937. Likewise, if Central permitted Universal, as its owned and controlled freight forwarder, to perform part of the transportation services which Central could have itself performed and charged for under its line-haul tariffs, then the services performed by Universal bring it within the scope of the Carriers Taxing Act and the Railroad Retirement Tax Act.

[7] The Railroad Retirement Board in the District of Columbia case (*Universal Carloading & Distributing Co. v. Retirement Board*, 71 F. Supp. 369; on appeal 172 F. 2d 22; the Commissioner of Internal Revenue in the instant case.

lines to destination or to a connecting carrier . . ." (R. 943, fdg. 60); (2) "A major part of the activities of Universal are activities which could be performed by railroads, and are activities in connection with the transportation of property by railroad for which the railroad could make a charge . . ." (R. 943, fdg. 61); (3) "A substantial amount of Universal's activities consisted of loading and unloading their carload freight for Central in New York, and for the Reading at Philadelphia, under tariffs in which the railroads obligated themselves to perform such services." (R. 943-944, fdg. 62).[8] As is conceded in the petition, "There is no dispute as to the facts." (Pet., p. 7).

Second, petitioner's effort to avoid the conclusiveness of the foregoing findings of fact by characterizing one of such findings as "involving a conclusion of law as well" (Pet., p. 7, n. 6), is simply resolved by reference to this Court's opinion in the *Duquesne* case, *supra*. In this case an argument which is substantially the same as that here submitted by petitioner, supported by a detailed review of the legislative history of the coverage provision in the Railroad Retirement Act, was advanced to this Court, 326 U. S. 446, 451-452. The Court found it unnecessary to resolve the conflicting contentions on the legislative history because it determined that the loading and unloading services which Duquesne performed were alone decisive on the question involved.[9] It concluded that the definition of "employer" within the meaning of the Railroad Retirement Act and the Railroad Unemployment Insurance Act—which, as noted above, is identical with the definition contained in the Railroad Retirement Tax Act—at the very least "embrace activities which form a part of transporta-

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[8] The appellate court below affirmed the trial court's findings of fact (R. 979, note 6).

Further, as stated by the trial judge below, both the District of Columbia trial court and court of appeals held that similar findings of fact by the Railroad Retirement Board were supported by evidence and clearly disclose that petitioner comes within the second element of the definition "employer" (R. 879).

[9] 326 U. S. 446 at 453.

tion service within the meaning of the Interstate Commerce Act.'"[10] In so holding, this Court quoted with approval court and Commission decisions that unloading carload freight constituted a transportation service within the meaning of the Interstate Commerce Act, *including a Commission decision dealing with less-than-carload shipments.* The Court reasoned that it therefore necessarily followed that Duquesne's loading and unloading services were services performed "in connection with the transportation of . . . property by railroad.'"[11]

The court of appeals below as well as the trial court relied specifically on this Court's opinion in the *Duquesne* case, and properly held that the decision leads inescapably to the conclusion that the services performed by Universal are within the coverage of the Railroad Retirement Tax Act (R. 979). As set forth above, the trial courts finding of fact, the evidence in support of which has been held sufficient by four courts and two administrative agencies, indisputably show that petitioner's functions are fundamentally the railroad common carrier transportation functions of handling less-than-carload freight.[12] It loads and unloads such freight and provides for its transportation by railroad. Such services squarely fall within the holding of the *Duquesne* case. Actually, as stated by the court of appeals below, "the case is stronger than Duquesne's, for in addition to loading and unloading Universal performs many other services which could be performed by railroads in connection with the transportation of property and for

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10 *Ibid.*

11 *Id.* at 455.

12 The point that a railroad could, as a part of its transportation, perform services which petitioner performs, is clearly made by this Court in the recent decision of *Chicago, Milwaukee, St. Paul & Pacific R.R. Co., et al. v. Acme Fast Freight, Inc.*, 336 U.S. 465, wherein it is stated (p. 477):

> "The fact that Congress studiously avoided characterizing forwarders as carriers, while at the same time subjecting them to *many of the duties and responsibilities of such carriers,* serves to emphasize the distinction drawn by the Act. In their relation with shippers, forwarders *unquestionably perform functions and have duties similar to the functions and duties of common carriers.*' (Italics supplied.)

which the railroad could make a charge." (R. 979). The case is also stronger for an additional reason. Universal handles less-than-carload freight which ordinarily is handled by a railroad,[13] whereas Duquesne loaded and unloaded carload freight ordinarily performed by the shipper or receiver.[14]

Accordingly, there is no denying the fact that under the *Duquesne* opinion the loading and unloading services here involved *can* be performed by a rail carrier and as such plainly constitute services performed "in connection with the transportation of . . . property by railroad."

Petitioner's answer to the impact of this decision is: first, that the facts and regulating law were radically different in the *Duquesne* case, despite the findings of the courts below that the services there discussed and here involved are identical and subject to identically worded coverage provisions; second, that this Court intended to limit its observations in the *Duquesne* case to the peculiar facts of that case, although there is not the slightest suggestion in the opinion that loading and unloading railroad freight, whether performed by a carrier controlled warehouse or by a carrier controlled freight forwarder, should not receive like interpretation by the lower federal courts; third, that the courts below ignored the distinguishing feature of the instant case in that here, unlike Duquesne, petitioner performs its loading and unloading "as an integral part of its freight forwarder transportation service" (Pet., p. 17)—an argument which, as shown above, was pointedly rejected as beside the point and not the question involved.[15]

2. The cases of *Allen* v. *Ocean S.S. Co. of Savannah*, 123 F. 2d 469 (C. A. 5th) and *Magruder* (*Walling*) v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (C. A. 4th), relied upon

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[13] For example, the Pennsylvania Railroad—see the *Duquesne* opinion, 326 U. S. 446 at 450.

[14] *Ibid.*

[15] 326 U. S. 446 at 454.

by petitioner as being in conflict with the decision below (Pet. 24-26) are not in point. Both cases involved water carriers, and the decisions hold only that the railroad statutes were not intended by Congress to extend beyond services which were habitually and intimately connected with railroad operations. Moreover, in view of the fact that both cases were relied upon by the Duquesne Warehouse Company in its brief in that case,[16] but were not discussed in this Court's opinion, the conclusion seems warranted that they were regarded as no more applicable there than they are here.

3. Petitioner's argument that Congress did not intend to include freight forwarders within the definition of employer in the Railroad Retirement Tax Act (Pet., pp. 27-35) once again is a repetition of the fallacious premise which runs throughout its argument. The question here involved is not whether freight forwarders as such were intended to be covered under the Railroad Retirement Tax Act, but rather whether a freight forwarder actually controlled by a railroad and performing service in connection with the transportation of property by railroad is covered. What petitioner neglects to point out to this Court in its discussion of the legislative history is that the proposal on coverage of freight forwarders which Congress rejected was that *all* freight forwarders—those not controlled by carriers as well as those which were controlled—should be covered within the definition of employer.[17] Opponents of this proposal recommended no coverage of any freight forwarder.[18] The conflict is also disclosed by the committee

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[16] 49 Records & Briefs, U. S. Supreme Court, Oct. Term 1945, No. 103, Petitioner's Brief, pp. 8-9, 18, 19, 45.

[17] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., pp. 42, 151-152, 317, 1118, 1133-1134; Hearings before Subcommittee of the Senate Committee on Interstate Commerce on S. 293, 79th Cong., 1st Sess., pp. 37, 317-318, 407-408.

[18] House Hearings, *id.* at pp. 672, 808-826; Senate Hearings, *id.* at pp. 176, 178, 261-268.

reports.[19] The result was a compromise whereby Congress left open to the courts the question of whether railroad-controlled freight forwarders were within the coverage definition. While Congressman Boren, in explaining the intention of the House Committee in its report No. 1989, stated that "no freight forwarder is intended to be covered", Congressman Bulwinkle, who submitted the report, later explained that "It was positively not the intention of the committee in its report on H. R. 1362 to take a position or express a view on this question [coverage of railroad-controlled freight forwarders] which is now pending in the courts." The logical answer ultimately given by the courts is convincingly stated by the trial judge below when he stated (R. 880):

> "The force of the taxing Acts would be evaded if a carrier could use an agent, which it owned or controlled, to perform 'railroad-like' services and have the agent instead of the railroad collect therefor, and have the agent pay no tax as an 'employer' under the Carriers' Taxing Act or the Railroad Retirement Tax Act. See *Despatch Shops, Inc. et al. v. Railroad Retirement Board, et al.*, 154 F. 2d 417 at 419."[20]

We can think of no more common sense result or more persuasive reason than the foregoing statement for the sound-

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[19] Sen. Rep. No. 1710, 79th Cong., 2d Sess., Pt. 1, p. 6, Pt. 2, pp. 1-2. *Cf.* H.R. Rep. No. 1989, 79th Cong., 2d Sess., pp. 1, 7 as modified Cong. Rec. of June 4, 1946, p. A 3188 and Cong. Rec. of June 10, 1946, p. 6598.

[20] To the same effect, see *Despatch Shops v. Railroad Retirement Board*, 153 F. 2d 644 at 646, wherein the United States Court of Appeals for the District of Columbia observed:

> "If Despatch, in this situation, is not an 'employer' under the terms of the Act [Railroad Unemployment Insurance Act], it can be readily seen that the railroads would be free to take from under the Act virtually all of their workers whose employment is in the 'supporting activities', through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance-of-way through engineering or bookkeeping might be done by so-called 'independent' corporations. The application of this Act and of the other Acts passed for similar purposes and embodying the same language could be so severely limited as to render them of little worth in achieving the purposes for which they were passed."

ness of the judgment below, and for the rejection of petitioner's contention that Congress did not intend to cover freight forwarders under the Railroad Retirement Tax Act even though they are controlled by railroads and perform services which a railroad could perform as a part of its transportation service.

CONCLUSION.

It is clear from the foregoing that:

(1) No important question of federal law is involved which has not been settled by this Court; nor has the court below decided a federal question in a way probably in conflict with applicable decisions of this Court. The only applicable decision of this Court is the *Duquesne* case, and this decision was correctly followed and applied by the lower court.

(2) There is no conflict in decisions of the several circuit courts of appeals. On the contrary, the only other circuit court decision on the matter (*Universal Carloading & Distributing Co.* v. *Railroad Retirement Board*, 172 F. 2d 22, C. A. D. C.) is in agreement with the lower court's decision.

We respectfully submit that the petition for a writ of certiorari should be denied.

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